

UGANDA / JUDGMENT

Mabirizi v Obore & 5 Others
(Miscellaneous Appeal 9 of 2024)
[2024] UGHACD 11 (3 December 2024)
[2024] UGHACD 11

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Okuo-Kajuga, J

CASE / FILE NUMBER

Miscellaneous Appeal 9 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKASERO

(ANTI-CORRUPTION DIVISION)

CRIMINAL MISCELLANEOUS APPEAL NO. 0009 OF 2024

(Arising from Criminal Case No. 007 of 2018)

**MALE H. MABIRIZI K. KIWANUKA (PRIVATE
PROSECUTOR) ::::::::::::::: VERSUS 1 OBORE CHRIS ARIKO 2 ADILO
DANIEL 3 OKWII EMMANUEL EMURON ::::::::::::::: 4 KAAYA RAJAB
SEMALULU 5 RANNY ISMAIL 6 OKEMA LEONARD**

Before: The Hon. Lady Justice Okuo Jane Kajuga

JUDGEMENT

Introduction:

This is an appeal against the decision of the Magistrate Grade 1 at the Anti-Corruption Court delivered on the 16th of August 2024 by which she dismissed the appellant's application to commence a private prosecution against the accused persons, all of whom are employees of the Parliament of Uganda.

The grounds on which the appeal is based are the following:

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- 1. The Learned Magistrate erred in law and fact when she held that she had powers to determine whether the complaint of money laundering over which she had no jurisdiction, was frivolous or vexatious;
- 2. The learned Magistrate erred in law and fact when she held that the complaint did not disclose any legal basis for court to summon the respondents for committal to the High Court for trial;
- 3. Lastly, the learned Magistrate erred in law and fact when she dismissed the complaint on account of failure to attach committal papers.

Background to the appeal:

On the 15th of April 2024, the appellant filed a complaint on oath for the institution of criminal proceedings through private prosecution against Obore Chris Ariko, Adilo Emmanuel, Okwii Emmanuel Emuron, Kaaya Rajab Semalulu, Ranny Ismail and Okema Leonard alleging that they criminally acquired, withdrew, possessed and used a combined Ushs 16,030,217,000/= (Shillings sixteen billion thirty million two hundred and seventeen thousand shillings) disguised as money for conferences, meetings, buying and branding gifts for visitors to Parliament and corporate social responsibility.

He attached a copy of a charge sheet with five counts, all of which revolve around alleged corrupt or fraudulent payments to the accused persons of the total amount of Ushs 1 6,030,217,000/⁼

The counts are:

Ct 1: Money Laundering c/s 3 (c), 1 16 and 136 of the Anti-Money laundering Act, 2013. The particulars were that the six accused intentionally acquired, possessed and used Ushs 16,030,217,000/= for the above mentioned activities, knowing such monies to be proceeds of Crime to wit, Corruption contrary to section 2(g), 2(h), ³ and 26 (1) of Anti-Corruption Act, 2009.

Ct 2: Money Laundering c/s 3(b), 1 16 & 136 of the Anti-Money Laundering Act, 2013. The particulars are that the accused intentionally concealed, disguised and impeded the establishment of the true nature of the Ushs 16,030,217,000/=

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disguised as money for conferences, meetings, buying gifts and corporate social responsibility knowing these monies to proceeds of crime, to wit, corruption contrary to section 2(g), 2 (h), 3 and 26(1) of the Anti-Corruption Act, 2009

Ct 3: Theft c/s 254 (1) and 261 of the Penal Code Act

The particulars allege that the six accused fraudulently and without claim of right between 6th February and 7th March 2024 took a combined total of Ushs 16,030,217,000/= the property of the Parliament of Uganda and tax payers.

Ct 4: Obtaining Money by False pretences c/s 304 and 305 of the Penal Code Act

The particulars are to the effect that the six politically exposed persons between 6th and 7th March 2024 by false pretences and with intent to defraud, obtained from the Parliament of Uganda, the consolidated fund and the tax payers of Uganda ^a combined total of Ushs 16,030,000 disguised as money for conferences, meetings, buying and branding gifts for visitors to Parliament and corporate social responsibility.

Ct 5: Cheating c/s 307 of the Penal Code Act

The particulars are that the accused persons by fraudulent tricks obtained from the Parliament of Uganda Ushs 16,030,217,000/= disguised as money for conferences, meetings, buying and branding gifts for the visitors to Parliament.

He supported the application with an affidavit in which he deposed that the amounts complained of were deposited on the accounts of the suspects, yet they were not holders of the offices for which the purported activities were to be made. He attached an untitled document which he alleged contained the criminal transactions. This document has columns with the names of each of the accused, how much each person received, the dates, the voucher number and activities for which the money was paid.

He added that he was ready to adduce evidence at the trial to prove the allegations.

It is not necessary to get into the propriety of the framing of the proposed charges, since the duty to draft a proper charge sheet rests on the magistrate.

Reoresentation:

The appellant was self-represented.

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Submissions of the appellant:

The appellant submitted that the magistrate erred when she held that she had the jurisdiction to determine if the complaint on oath was frivolous or vexatious. In doing so, she assumed the power of the High Court. He submitted that she had no capacity to determine whether a prima facie case had been established, and that in an offense triable only by the High Court, the only person capable of determining the same is the Judge.

He further argued that the private prosecutor has no obligation to bring documents and information to court. That notwithstanding, he had attached proof that money had been placed on the suspects' accounts. In his considered view, he had provided sufficient information as all he is required to prove under the Anti-Money-laundering Act is that money had been placed on the suspect's accounts.

The Law on private prosecutions:

The 1995 Constitution of Uganda provides for both public and private prosecutions. Specifically, Article 120 (3) (c) of the Constitution presupposes the right of any person or authority other than the Director of Public Prosecutions, to bring a private prosecution. This right is further safeguarded by limiting the Director of Public Prosecution's control over the same, in that whereas the DPP has unfettered power to take over such a prosecution at any time, he or she cannot withdraw it without the leave of court.

The foundations of private prosecutions lie in English jurisprudence. They are an integral part of our criminal justice system and allow parties who would rather not file a complaint with the police for one reason or another, those who wish to have more control over the prosecution process and those irked by perceived inaction of the State, to institute criminal proceedings by themselves. The exercise of this right is subject to the control of the DPP who may take it over. See *Gouriet versus Union of Post Office Workers*, 1978 AC 477.

Section 2(1)(g) of the Magistrates Courts Act provides that a criminal prosecution may be instituted by any person other than a public prosecutor or ^a police officer, making a complaint to a magistrate and applying for the issuance of a warrant or summons for the accused person to appear in Court. The complaint may be in writing and signed by the person wishing to institute the proceedings

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or may be made orally. In the latter instance, the magistrate is obliged to reduce it into writing and have the complainant sign it.

The manner in which the complaint may be made is prescribed under S. 42 (3) as follows:

> "Any person, other than a public prosecutor or a police officer, who has reasonable and probable cause to believe that an offence has been committed by any person may make a complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be. Every such complaint may be made orally or in writing signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the *complainant.*"

The procedure in **Section 42 (1) (c)** is intended to make it easy for anyone to make a complaint. The complainant has to show that he or she has a reasonable or probable cause to believe that an offense has been committed by the suspect.

Reasonable and probable cause has been defined in several cases as a genuine belief, based on reasonable grounds, that the proceedings are justified. See **Hicks v. Faulkner** (1878) L. R. 8 Q. B. D. at 171 where Hawkins, J. said

> 'I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.'

In this regard the complaint must not be a mere allegation, but must contain information establishing the grounds however brief, on which the suspicion or belief of criminal action by the suspect is based. The circumstances which convince the complainant that the accused person committed the offense complained of must be apparent, and taken into consideration by the magistrate.

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Under Sections 42 (1) (a) and (b), a public prosecutor commences a criminal prosecution by laying the charge before the court. It is presumed that the public prosecutor having analyzed the evidence implicating the accused, makes the critical decision on whether to charge or not. Once the public prosecutor has decided to charge, the court only receives the charge sheet and endorses it. The trial magistrate is not expected to enquire into what evidence the public prosecutor has at that stage, or even whether there is reason or probable cause for the charges.

For private prosecutions, the power vested in the public prosecutor to determine whether to charge or not, is vested in the trial Magistrate who receives the complaint. This is the full import of Section 42 (5) of the MCA, which requires the trial magistrate to establish whether the complaint bears merit and is not frivolous or vexatious (brought with the primary intention of harassing or merely causing problems to the accused; brought in bad faith). He or she is not expected to automatically sign the charge sheet and register the case, as happens for cases brought by public prosecutors.

In order to make the decision on whether to allow private prosecution, the trial Magistrate must consider:

- a) The complaint itself and the evidence provided on oath, whether verbal or by affidavit. Do they establish the grounds for the complainant's belief that a crime has been committed? Section AZG) (b) of the MCA, provides that a warrant shall not be issued in the first instance unless the charge is supported by evidence on oath. either oral or by affidavit. Though not clearly specified in the law, it can be safely concluded that this evidence may be provided by the complainant or by other parties with information.
- b) The information received from the Local Chief of the area where the complaint arose, as required under Section 42 (41) of the MCA which reads: "Upon receiving a complaint under sub section (3), the magistrate shall consult the Local Chief of the area in which the complaint arose and put

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on record the gist of that consultation; but where the complaint is supported by a letter from the Local Chief, the magistrate may dispense with consultation and thereafter put that letter on record.

This provision is couched in mandatory terms. The magistrate must consider whether the information from the Local Chief supports the commission of the crime, confirms where the offense occurred and whether the accused resides there.

- c) Lastly, the court may consider any evidence received from a police investigation, in cases where the trial magistrate exercised his or her discretion to direct for further investigations by the police before allowing the private prosecution, as required by Section 42(7) of the MCA which provides:

"Notwithstanding sub section (6), a magistrate receiving any charge or complaint may, if he or she thinks fit for reasons to be recorded in writing, postpone the issuing of a summons or warrant and may direct an investigation to be made by the police into that charge or complaint and a police officer receiving such a direction shall investigate or further investigate the charge or complaint and report to the court pursuant to the direction.

It is within the discretion of the magistrate whether to direct for investigations by police or not, in circumstances where he or she believes such investigations to be necessary. It is not a mandatory requirement. However in complex fraud and corruption related matters such an investigation is more likely to be a necessity, than not.

Finally, the magistrate must decide whether all the assembled facts prima facie, disclose the commission of an offense by the accused. Prima facie literally means "on the face of it". Oxford Advanced Learners Dictionary defines it as "based on one's impression, accepted as correct until Proven otherwise"

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It is only when the magistrate is satisfied that prima facie, the commission of an offense has been disclosed that he or she shall draw up a charge, sign it and issue either summons or a warrant for the accused to attend court. This is provided for in Section 42(5) of the MCA. It reads:

After satisfying himself or herself that prima facie the commission of an offence has been disclosed and that the complaint is not frivolous or vexatious, the magistrate shall draw up and shall sign a formal charge containing a statement of the offence or offences alleged to have been committed by the accused.

The decision of the Lower Court:

The magistrate, faced with the complaint and the document in the application before her, held as follows;

"In the present case the complaint is only accompanied by a charge sheet, and a photo copy of an untitled document. I find that this does not disclose any legal basis for this court to summon the respondents for committal to the High Court for trial on any of the cases listed on the charge sheet. Secondly, the process of committal under section 168 of the MCA states that once a person is charged in the magistrate's court with an offence triable by the High Court, the DPP shall file in the magistrate's court an indictment or summary of the case. The magistrate then reads the indictment and summary to the accused, gives them a copy of each and then commits them to the High Court for trial.

In my view it follows therefore that the provisions of section 168 of the MCA apply to private prosecutions, subject to any modifications necessary to tailor the process for private prosecutions.

In the present matter, no indictment or summary of the case was filed. Therefore to summon the respondents based on the present application

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would amount to summoning the respondents to discuss their intended trials"

The magistrate found that there was no legal basis upon which to summon the respondents, therefore declined to issue criminal summons and dismissed the application.

The following are the issues for resolution in this appeal:

- 1. Whether the magistrate had the jurisdiction to entertain the application and determine whether the intended charges were frivolous or not, since a charge of money Laundering was involved.
- 2. Whether the private prosecutor has the legal obligation to furnish the court with documents and information; alternatively whether the magistrate was right to find that there was no legal basis to charge the accused

- 3. Whether the magistrate erred in law and fact when she dismissed the complaint on account of failure to attach committal papers.

It is the duty of the appellate court to review the evidence as a whole and come to its own decision on the facts, being mindful of the judgement appealed from. (Kifamunte Henry V Uganda SCCA No, 10 of 1997 and Bogere Moses and Anor V Uganda, Supreme Court Criminal Appeal No. I of 1997). Section 36 of the Criminal Procedure Code Act Cap 25 empowers an appellate court to alter or reverse orders of the lower court on appeals from any other orders other than acquittal, conviction or dismissal.

Issue ¹

Whether the magistrate had the jurisdiction to entertain the application and determine whether the intended charges were frivolous or not, since no charge of money laundering was involved.

It was contended by the private prosecutor that only the High Court has the jurisdiction to entertain an enquiry on Money Laundering, therefore the magistrate

could not

purport to enquire into the same and arrive at the decision that there was no prima facie evidence to warrant drawing up a charge. He relied on Section 1 of the Anti-Money Laundering Act, Cap 118 which vests the jurisdiction in all money laundering offenses with the High Court.

He submitted that the magistrate ought to have forwarded the matter to the High Court to determine if there is a prima facie case.

He relied on the decision in Uganda versus Kotongo Molly and 4 others, Criminal Revision Case No 1/2024 where Justice Muwata Isaac held that the Chief magistrate had no jurisdiction to take plea given the nature of the charges presented before him. In that case, the Chief Magistrate had taken plea for some of the accused who were joined in the same charge sheet with another charged with a capital offense of murder. Accordingly, he set aside the pleas for having been taken irregularly and directed that they would take plea at the commencement of their trial before a court of competent jurisdiction.

I have carefully considered the provisions of the Magistrates Courts Act on private prosecutions and I am satisfied that no limitation is placed on the category or nature of offenses which can be privately prosecuted. Section 42 refers to the institution of criminal proceedings generally. It follows therefore that the procedure prescribed for commencement of private proceedings applies both to capital, non-capital cases, and other offenses whose jurisdiction is restricted to the High Court by Statute. I am further in agreement with the appellant that owing to the fact that the complaint included money laundering offenses, the jurisdiction to try the case lies with the High Court.

The cardinal question is, how does the matter proceed to the High Court in the case where jurisdiction to try is vested only in it? In such instances, is the decision to charge vested in the magistrate or the High Court under the law?

Section 42 (6) of the MCA offers guidance on what happens in instances where the magistrate is faced with an application for private prosecution for offenses where he or she does not have the jurisdiction to try or enquire into.

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It provides as follows:

- (7) Where a charge has been-
- (a) laid under the provisions of subsection (1) (b); or (b) drawn up under the provisions of subsection (5), the magistrate shall issue either a summons or a warrant, as he or she shall deem fit, to compel the attendance of the accused person before the court over which he or she presides, or if the offence alleged appears to be one which the magistrate is not empowered to try or inquire into before a competent court having jurisdiction except that a warrant shall not be issued in the first instance unless the charge is supported by evidence on oath, either oral or by affidavit. (emphasis mine)

From the foregoing, it is the sole duty of the magistrate to determine whether to draw up a charge or not, regardless of whether the charge is triable by ^a magistrate's court or not. The exercise of that power is dependent on whether he or she is satisfied that on the face of it, a crime has been committed warranting the accused's prosecution. It is only where the magistrate has made that decision that she draws the charge, and issues a warrant or summons for the attendance of the person, then forwards the matter to the High Court. As earlier discussed in this Ruling, the magistrate in private prosecutions is vested with the right to make ^a decision on whether to charge or not. She or he therefore makes the determination on whether the charge is frivolous or not. I have explained in detail hereinbefore, how the magistrate arrives at that decision.

In the case of *Uganda versus Kassiano Wadri and others*. Criminal Revision No 0002/2018, Justice Mubiru discussed the question of jurisdiction. He observed that under section 42, all criminal prosecutions whether misdemeanors, noncapital and capital felonies must begin in a magistrate's court, yet they do not have the jurisdiction over capital cases whose trial is the preserve of the High Court.

He further held that the power conferred on a magistrate's court by Section 42 and 168 (3) of the MCA with regard to capital offenses is limited to charging and

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committing for trial, which power is in the form of assistant, supplemental, ancillary or auxiliary jurisdiction in that it is afforded to a magistrate's court in aid of the High Court. It is the jurisdiction that allows a sub ordinate court to take cognizance of a case that would ordinarily be outside of its subject matter jurisdiction.

I agree with the decision above as it is in line with Section 42(6) of the MCA. For the same reason, I find the decision in Uganda versus Katanga Molly, quite distinguishable from the present facts. It relates to the grant of bail, a matter quite distinct from private prosecution.

I am further persuaded in this view, by the fact that under Section 2 of the Trial on Indictments Act Cap 25, no criminal cases shall be brought under the cognisance of the High Court for trial unless the accused has been committed for trial in accordance with the Magistrates Courts Act.

All criminal trials must therefore start in the Magistrates Court. The charges are read to the accused, in line with Article 28(3) (b) of the Constitution, but no plea can be taken. The magistrate can only then commit the accused for trial to the High Court. The jurisdiction vested in the magistrate in Section 42, is not to try the case. It is an ancillary duty. After making the decision to charge, the case is then forwarded to the court with competent jurisdiction to try. This does not amount to usurpation of the powers of the High Court to try the case.

It is not true, as submitted by the appellant that Section 42 of the MCA does not apply to offenses triable by the High Court. It expressly provides what should happen where the magistrate has no jurisdiction.

Ground one of the appeal accordingly fails.

Issue 2:

Whether the private prosecutor has the legal obligation to furnish the court with any documents and information (evidence); alternatively whether the magistrate was right to find that there was no legal basis to charge the accused

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It was submitted by the appellant that the burden of proof in a case of Money Laundering is different from that in ordinary criminal cases, and that once the prosecution has furnished evidence of possession of money, the burden shifts to the accused. The appellant contended that once he showed that the accused received or possessed the money, as per Annexure A, he had no other burden to discharge.

The above assertion is rather erroneous. Under Article 28 (3) (a) of the Constitution, every accused person is presumed to be innocent until proven guilty or pleads guilty. The burden of proof rests on the prosecution and does not shift, unless the law imposes upon that person, the burden of proving particular facts. (See Article 28 (4) (a) of the Constitution). There is no such provision for money laundering offenses.

It was also argued that a person or authority wishing to commence private prosecutions does not have the duty to bring evidence and information.

I have already explained that under Section 42 (3) of the MCA, the complaint must show that the complainant had reasonable or probable cause to believe an offense has been committed. This may be done through the complaint on oath of the prosecutor himself or other evidence. Especially in complex cases of fraud, there must be a basis given for the belief that the accused has committed a crime.

It would be ridiculous for a complaint to only make an allegation and stop at that. "Reasonable or probable cause to believe" is the basic standard, and it is a very low evidential threshold. It may serve the complainant well to provide some evidence if he has it, because ultimately, the magistrate will require evidence or materials upon which to determine whether to charge or not. Some of that material may be within the personal knowledge of the complainant so it is not logical for him or her not to provide it. As earlier stated, in private prosecutions the decision to charge or not is vested in the magistrate.

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I note that this is what the appellant did in this very case. He made a complaint on oath and attached evidence of payments to the accused persons as reasonable basis for the proposed charges.

However, the cardinal duty to investigate the complaint lies on the Magistrate. Whether the complainant has adduced evidence or not, the magistrate is required to use the methods of enquiry that have been furnished to him or her by Sections 42 (4) and (7) of the MCA to secure the same. The first being the enquiry or consultation with the Local Chief. The second is the investigation by the police.

It should be borne in mind that in cases of Money Laundering the police investigation must be by an officer of or above the rank of Assistant Inspector of Police. Under the Anti Money Laundering Act, Cap 18, investigative procedures like entry, search and seizures, document search warrants, monitoring orders etc. can only be carried out by an authorized officer who is defined in Section 1 as the Executive Director or Deputy Executive Director of the Financial Intelligence Authority, a prosecutor of the Director of Public Prosecutions and a police officer of the rank of Assistant Inspector of Police or higher.

The importance of the consultation with the local chief and the mandatory nature of this requirement was discussed by Justice Gadenya P in the Criminal Appeal No 812023, Uganda (Private Prosecution by MAIE H. MABIRIZI KIWANUKA versus HON. MAO NOBERT and 2 others where he held:

> "...the requirement for a Magistrate to consult with the Local Chief is mandatory and can only be dispensed with if the complaint presented is supported by a letter from the local chief. In contrast, the presentation of a Complaint on Oath, supported by a letter from a local chief, remains discretionary for the complainant.

> The correct position of the law is that even if a complainant files a complaint on oath without a letter from the local area chief to support the complaint, that fact does not render the Complaint on

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Oath incompetent. Presentation of a letter from the local area chief is discretionary on the part of a complainant, and they need not request that such be done by the magistrate.

A complaint on Oath can only be judged incompetent on the grounds of jurisdiction, non-establishment of a prima facie case, and the institution of frivolous and vexatious claims. ^A magistrate presented with a Complaint on Oath bears the primary burden of consulting and fact finding from the area's local chief. If, for one reason or another, a zealous complainant provides a letter from the area local chief in which the complaint arose, they will have done the magistrate a favour, who in turn may dispense with the requirement to consult bestowed upon them in the law or still go ahead and consult then document their findings which form part of the record. Therefore, having noticed that the appellant had not exercised his discretion by accompanying the complaint with a letter from the local chief, the trial magistrate should have taken it upon himself to consult with the local chief rather than prematurely dismiss the complaint. The prerequisite of consulting with the area's local chief is mandatory for the Magistrate whereas the presence of a letter from a local chief is discretionary for a complainant. This spoken-of mandatory requirement on the part of the magistrate can only be dispensed with in situations where a complainant has presented ^a supporting letter from the local chief which was not the case here. *kmohosis miner*

The Judge also gave a well-reasoned judgement on who the local chiefs are. I see no need to reproduce the same here, but I am persuaded by his decision.

- The magistrate may also direct an investigation by the police if he or she deems it necessary.

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Justice Gidudu in Uganda (Private prosecution by Male Mabirizi) versus Ebilu David Livingstone, Criminal Appeal No 112024 guided as follows:

"It is clear from the provisions of the law cited above that a complaint to a magistrate does not need to be accompanied by sufficient evidence to support the complaint. It is the duty of the magistrate to obtain evidence by way of reports from either the local chief of the area where the complaint arose or the police to determine judicially if prima facie the commission of an offense is disclosed and the charges are not frivolous or vexatious.

In light of the foregoing, I find that the magistrate in the instant case erred by dismissing the application without carrying out the investigations required by law. It was her responsibility to do so.

I wish to add that the magistrate cannot conclude that the local chief has no information to provide. This seems to be the position taken by the Magistrate in her Ruling. She stated therein as follows; "In complex matters where the local chief would have no access to information required to have knowledge of the alleged crimes, it has been noted that the rights of individuals to private prosecution best be served by having recourse to documents attached to the application to determine whether or not a prima facie case was made out"

I point out that the private prosecution envisaged several offenses apart from Money laundering. Ordinary penal code offenses of theft and obtaining money by false pretenses were part of the complaint. It is incumbent on the magistrate to make the enquiry, and if it yields no useful information, revert to other materials obtained from the complaint on oath, evidence furnished by the complainant or from police investigations.

This ground succeeds

Issue 3:

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Whether the magistrate erred in law and fact when she dismissed the complaint on *account of failure to attach committal papers.*

It is the appellant's case that the magistrate erred when she held that he had not attached an indictment or summary of the case. He submitted that it is the duty of the Court to draw up these documents then commit the accused to the High Court. Further, he stated that private prosecutors are not technical people and so it is dangerous to require them to draft the papers.

It is the law that the High Court takes cognisance of all criminal cases through committal. **Section 42 of the MCA**, however, is silent on who prepares the committal papers if the magistrate finds sufficient justification to charge the accused. Whereas there is a specific legal requirement for the magistrate to draw the charge and issue the summons or warrant for the accused to appear, there is none for committal.

Section 168 of the MCA places the responsibility for the preparation of the Indictment and summary of the case on the Director of Public Prosecutions. These documents are then presented to the Magistrate who under **S 168 (3) (b)** gives a copy to the accused, reads and explains them to the accused. He or she is also to notify the accused that he will take plea before the High Court, then commit the accused for trial. The process of committal is handled by the magistrate on documents presented by the prosecutor.

In determining the appropriate person to draft the committal papers in private prosecutions, I have considered the Kenyan Authority of **Roselyne Miano & another v Edward Kariuki Ngige and 5 others** (Miscellaneous Criminal Appeal 222 of 2013) [2015] KEHC 5424 (KLR) (15 April 2015) which I find persuasive and relevant in resolving this question.

It was argued in that case that **Section 348 A of the Kenyan Criminal Procedure Code** which provides for filing appeals from the subordinate court to the High Court does not grant the applicant (a private prosecutor) the right to appeal. It states:

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"348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order to on a matter of law."

It was held by the Judge that:

"...the fact that it is only the Attorney-General (now Director of Public Prosecutions) who is named under Section 348 A as the person who may file an appeal does not exclude a private prosecutor. To find so would be a narrow interpretation of the provision. Taking into account that a private prosecutor in essence conducts the proceedings on behalf of the public prosecutor, it follows then that he has the right granted to the public prosecutor to appeal against the decision of the subordinate court."

I find the above instructive. Section 168 of the MCA should be read in the same spirit, to apply to a private prosecutor. The duty on the DPP to prepare committal papers, is a duty that vests, in my considered view, on the private prosecutor as well. The purpose of the summary of the case is for the High court to understand the evidence upon which the prosecutor will rely during trial to establish or prove the charges. This duty is best performed by the prosecutor, and not the magistrate. I therefore agree with the trial Magistrate in that regard, although it was rather premature for her to require the committal documents to be attached when she had not yet conducted the enquiry to determine whether to charge the accused persons or not.

Logically, the Magistrate would be required to turn over the materials she obtained from the enquiry to the private prosecutor who bears the burden to adduce the evidence in court, and determines what he or she will rely on at trial.

Having undertaken a private prosecution, the appellant cannot shy from the duty to prepare these document on grounds that it is too technical. Indeed prosecution itself is a skill and rather technical. There are also rules that govern the criminal trial

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procedure. A private prosecutor who takes on the task, has no option but to abide by the rules.

This ground fails.

CONCLUSION:

I have found that the magistrate erred in dismissing the application without carrying out the enquiry required under the law. Having succeeded on ground 1, the matter is referred to the trial Magistrate to conduct the requisite enquiries and determine the appellant's complaint on merit.

J

Jane Okuo Kajuga

Judge

Delivered on 3'd December 2024

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